No. 12379

In the United States Court of Appeals for the Ninth Circuit

ESTATE OF EDWIN F. GILLETTE, HARRIETTE O'NEIL GILLETTE, EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
MELVA M. GRANEY,
Special Assistants to the Attorney General.

INDEX

CITATIONS

In the United States Court of Appeals for the Ninth Circuit

No. 12379

ESTATE OF EDWIN F. GILLETTE, HARRIETTE O'NEIL GILLETTE, EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 72-95) are not officially reported.

JURISDICTION

The Commissioner determined a deficiency in estate tax against the estate of Edwin F. Gillette, deceased, and on June 20, 1947, mailed notice of the deficiency to Harriette O'Neil Gillette as executrix of his estate. (R. 9-13.) A petition for redetermination of the deficiency under the provisions of Section 871(a) of the Internal Revenue Code (R. 4-13) was filed on August 28, 1947 (R. 13), within the permitted ninety-day period.

A hearing was held on June 10 and 11, 1948 (R. 2), and the decision of the Tax Court, deciding that there is a deficiency in estate tax in the amount of $37,933.11, was entered April 27, 1949 (R. 103). A petition for review by this Court (R. 104-106) was filed on July 22, 1949 (R. 106), and properly invoked the jurisdiction of the Court under Section 1141(a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether taxpayer sustained her burden of proving that the decedent's 1938 transfers of the Hartford and Lake Beulah properties were not made in contemplation of death within the meaning of Section 811 (c) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in con-

templation of death within the meaning of this subchapter;

* * * * *

(26 U.S.C. 1946 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.16. *Transfers in contemplation of death.* —Transfers in contemplation of death made by the decedent after September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, must be included in the gross estate. A transfer in contemplation of death is subject to the tax although the decedent parted absolutely and immediately with his title to, and possesion and enjoyment of, the property.

The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

* * * * *

STATEMENT

The facts found by the Tax Court (R. 73-89), taken from a stipulation of facts and evidence adduced at the hearing (R. 72-73), are as follows:

The decedent, Edwin F. Gillette, was born on October 19, 1863, and died on December 10, 1943, a resident of

Pasadena, California. He left surviving him his widow, Harriette O'Neil Gillette; two sons, Hyde and Edwin; and two daughters, Helen Gillette and Marietta Will. (R. 73.)

The decedent's estate was administered in the Superior Court of the State of California in and for the County of Los Angeles. The decedent's widow is the executrix of the estate. (R. 73.)

The decedent was not a man of business. Though well educated, including a course in architecture, he followed neither that profession nor any other for a livelihood. He was interested in studying and composing poetry in French and in doing beautiful cabinet work in a workshop. He interested himself in his fraternities and the publication of one, in a hunt club, a choral society, a tennis and swimming club. He drove a car a great deal and was interested in photography. He devoted all of his time to the above pursuits. (R. 78.)

Since 1917 the decedent had resided in Pasadena, California, and lived upon the income from property inherited from his father. He and his sister, Mrs. William S. Jenks, had inherited three pieces of real estate in equal shares—a 14-story office building in the Loop District in Chicago (hereinafter called the "Hartford Building"); the "Michigan Avenue property" on South Michigan Avenue in Chicago; and a summer home at Lake Beulah, Wisconsin (hereinafter referred to as the "Lake Beulah property"). (R. 78.)

The Hartford Building was in the hands of building managers, employed by the decedent's son Hyde, under power of attorney from his father and aunt, Mrs. Jenks. The building was subject to a mortgage of $85,000. From December, 1933, to September, 1938, the building was in a run-down condition and had produced no net income for its owners, except $310 to each in January, 1938, and $593.78 to each in August, 1938. Decedent's half interest was worth about $120,000. (R. 79.)

The Michigan Avenue property was in 1931 subject to a 198-year lease, producing $12,000 a year, and an option held by the lessees to sell to the lessee for $375,000, $75,000 of which had been paid. To assure delivery of and good title to the property under the option the Jenks family and decedent and his then wife had in 1931 given a bond for $75,000 secured by a trust deed on the property. The lessee-optionee was required either to erect an office building or put up as a guaranty for such erection $100,000 in securities by March 1, 1939. (R. 78-79.)

The decedent estimated that his interest in the Hartford Building was worth about $175,000 above the mortgage and that his interest in the Michigan Avenue property was worth about $100,000. His interest in the Lake Beulah property was worth about $10,000. (R. 79.)

The decedent also owned his home in Pasadena, California, estimated by him to be worth $15,000; about 333 acres of mountain land in Estes Park, Colorado, estimated by him to have a value of $16,000; a mining property in Colorado, estimated by him to be worth $5,000; and securities and other personal property which he estimated at $10,000. (R. 79.)

On September 17, 1938, the decedent conveyed his interest in the Hartford Building to his son Hyde in trust for decedent's four children; conveyed his interest in the Michigan Avenue property to Hyde as trustee; and conveyed his interest in the Lake Beulah property by warranty deed to his four children. At the time the decedent was a widower but was contemplating marriage with Harriette Marie O'Neil. On September 19, 1938, they entered into an ante-nuptial agreement in writing. (R. 73-74.)

In material part, the trust deed covering the Hartford Building, under which the decedent's son Hyde was trustee, provided that decedent transferred his half

interest in the Hartford Building in consideration of the trustee's assumption of and agreement to pay, but only from the assets of the trust, decedent's indebtedness on promissory notes to his sister Mrs. William S. Jenks in the amount of $40,000 and $4,000 accrued unpaid interest, and to pay future interest; that trust income should be paid equally to decedent's four children for life and, under the will of any child dying, to the descendants or spouse of any such child; that the trust should terminate upon the death of the last survivor of the four children and Mrs. William S. Jenks, but after the death of Mrs. William S. Jenks could be terminated by written instrument signed by a majority of the children; that upon termination of the trust the trust principal, including any accumulated income, should be distributed to the four children, if living, and to the issue of any deceased child or to his appointee by will, otherwise equally to the survivors among the four children and per stirpes to issue of any other deceased child; and that a majority of the four children or the survivors thereof could by writing alter, modify, or change the trust in any respect, but not after the death of one of them so as materially to affect the rights of those substituted for a deceased child. (R. 74.)

The note referred to in the trust instrument as for $40,000 and accrued interest was, in fact, for $41,560. It was a renewal on December 23, 1936, of a note for $34,000 given by decedent to his sister in 1931. Decedent paid the interest in 1931 and 1932 but never thereafter. (R. 74-75.)

On September 17, 1938, the decedent's son Hyde wrote decedent a letter stating, in material part, that he as trustee assumed and agreed to pay, but only out of the trust assets, the indebtedness to Mrs. Jenks, and would save decedent harmless with reference thereto. Since that time the trustee has paid the interest to Mrs.

Jenks from that trust, it being unnecessary to call upon the Michigan Avenue trust for any interest (under the provision hereinafter set forth). The record does not disclose whether Mrs. Jenks released the decedent from the indebtedness on the note. (R. 75.)

The trust instrument conveying the Michigan Avenue property to the decedent's son Hyde as trustee provided in material part as follows: That trust income should be distributed to the settlor, the decedent, except that Mrs. William S. Jenks should during her life receive $1,000 a year or such part thereof necessary to pay her $1,000 a year whenever the trust covering the Hartford Building did not pay her that much interest on the $40,000 indebtedness; that after the settlor's death income should go to assure Mrs. William S. Jenks $1,000 a year either from the Hartford Building trust or the Michigan Avenue property trust and, if settlor should marry and leave surviving him a widow who was living with him at his death, that such widow should be paid $1,500 per year for life; that other income should be paid for life to decedent's four children or to their descendants or spouses as appointed by their wills, or in case of no such appointment, *per stirpes* to their surviving issue, or, if none, to surviving issue of the decedent; that the trust should terminate on the death of the last survivor of the four children, Mrs. William S. Jenks, and settlor's widow, or by a written instrument signed by a majority of the children; that upon termination of the trust, principal and accumulated income should be distributed equally to the four children if living, but if any were dead to his issue or appointees by will; that after the death of the settlor, his widow, and Mrs. William S. Jenks, the trust could be altered, changed, or modified in any respect by a written instrument signed by a majority of the settlor's living children, but not to affect materially the rights of those substituted for a deceased

child; and that the trust could be terminated, altered, or modified in any respect at any time by the settlor, in writing. (R. 75-76.)

So far as material here, the ante-nuptial agreement between decedent and Harriette Marie O'Neil provided as follows: That the parties contemplated marriage; that Harriette O'Neil "has been fully informed as to what her statutory rights would be" as wife or widow; that decedent had recently conveyed his half interest in the Hartford Building in trust for his four children, subject to a mortgage of $85,000 against the whole property; that after deducting one-half of the $85,000 it is estimated that the half interest is worth $175,000; that decedent was indebted to his sister, Mrs. William S. Jenks, on promissory notes totalling $40,000, with accrued unpaid interest of $4,000, and that the trustee has assumed that debt, from which it is contemplated the sister will release him, the decedent; that he has recently conveyed his one-half interest in the Michigan Avenue property "in trust for the ultimate benefit of his four children;" that his half interest is estimated to be worth not more than $100,000; that he is to receive for life the net income, which was $6,000 under a lease, subject to possible payment of $1,000 a year to Mrs. William S. Jenks; that he has recently conveyed outright to his four children his half interest, estimated to be worth $10,000, in the Lake Beulah property; that he owns a residence in Pasadena, California, 333 acres of mountain property, a mining property in Colorado, and securities and personal property, estimated at $10,000; that he intends to provide $1,500 a year, from income of the Michigan Avenue property for his wife for her life after his death; that it is the intent of Harriette O'Neil to waive, relinquish, and bar her dower interest as wife or widow and homestead rights in decedent's property owned or to be owned

by him; therefore, that in consideration of the payment to her of the $1,500 per year for her life after decedent's death, and in consideration of marriage, Harriette O'Neil relinquishes, bars, and surrenders all her rights because of marriage, both dower and homestead, in the property owned or to be owned by the decedent, that she will join him, his heirs, administrators, executors, or assigns in any conveyances thereof, and he, his heirs, executors, administrators, or assigns may convey such properties without her joining. (R. 76-78.)

In 1938 decedent's sister, Mrs. Jenks, her husband, decedent's son, Hyde Gillette, and decedent's daughter, Marietta Will, lived in or near Chicago. Hyde, now aged 42, was an investment banker in Chicago. Marietta's husband, Howard Will, now aged 49, had been an attorney in Chicago since about 1924. The Gillette and Jenks families had a close friendly relationship. Mrs. Jenks was very fond of her brother's children. She had no other nieces or nephews. She and decedent were very devoted to each other. (R. 79-80.)

On May 8, 1938, the decedent wrote his son, Hyde, with an identical letter to each of the other children, in effect that he had been urging one Harriette O'Neil to marry him, but that she hesitated to come into the family and to give up the freedom which as a bachelor girl she had long enjoyed; that they were lovers "seeking such happiness as may be found at this late date"; that he would welcome any procedure tending to overcome her diffidence in meeting the members of the family; and that he hoped the letter would have favorable consideration. Harriette O'Neil was then 41 years of age and the decedent 75. (R. 80.)

The decedent's children, upon learning of the suggested marriage, were pleased at the prospect, except that the record does not indicate the attitude of Helen. (R. 80.)

Hyde first discussed the proposed marriage with the Jenks family in May, 1938, shortly after he received his father's letter. Mr. Jenks, who largely looked after his wife's interests, took a different view from that of the children, and of his wife to a lesser degree. He did most of the talking on the subject, and at times was loud and bitter on the subject. It was discussed by Hyde and the Jenks family several times, both in Chicago during the summer and at Lake Beulah in August and September. Howard Will joined in the later discussions. The Jenks family was unhappy at the idea. They did not see how decedent could afford to marry, and pointed out that he was receiving only $6,000 per annum from his interest in the Michigan Avenue property; that he was indebted to Mrs. Jenks on a note, upon which he was not paying the interest; that they felt that he should not take on additional obligations; that marriage involved additional expense and that decedent might possibly encumber his sister's interest in the Hartford Building and Michigan Avenue properties; and that, if the optionees on the Michigan Avenue property elected to purchase, it might not be possible to give clear title. Jenks pointed out that this might be ruinous for the two families because the Michigan Avenue property represented their only remaining source of income. Jenks at one time said that he would see that decedent was sued for collection of the notes before he incurred further obligations, or he would stop the marriage. (R. 80-81.)

Mr. and Mrs. Jenks did not insist that the two trusts contain provisions relative to the distribution of corpus to the children at termination. Their primary interest was to get the note secured. Will never explained to them the complete distribution of the trust corpus. (R. 81.)

As to the Lake Beulah property, Jenks and his wife also indicated that having a new head of the family

brought to Lake Beulah would result in complications. Decedent had not been paying promptly his share of the expenses of that property. It was used by both families, including grand children, as a summer home. (R. 81-82.)

Hyde Gillette felt that he would like to do anything he could to prevent a rift in the family and resolved to try to do something to prevent Jenks from expressing his strong feelings about the unpaid note. He approached Jenks, pointed out the feeling that was developing between decedent and his sister, and asked if he could not do something to keep harmony. There had been acrimonious exchange of letters in the past, which had "blown over," and Hyde knew that decedent would become excited and extremely headstrong if Jenks repeated his statement to decedent. Hyde conselled Howard Will and his law firm, and it was felt that the decedent's indebtedness to Mrs. Jenks might be secured by his interest in the Hartford Building. After further discussion it was decided that since Hyde was handling the Hartford Building he might as well be appointed as trustee and the Hartford Building transferred in trust to him. Jenks was adamant on Mrs. Jenks receiving some interest and Hyde decided that he would see that she was guaranteed at least $1,000 per year out of the approximately $2,000 interest due her, so he proposed that part of the decedent's $6,000 income from the Michigan Avenue property assure Mrs. Jenks of the $1,000. He felt that a trusteeship in him, over the Michigan Avenue property, was a logical vehicle to assure the payment of the $1,000 to Mrs. Jenks, if the Hartford trust was unable to do so. The Michigan Avenue trust was also created to assure the delivery of title, in case of exercise of the option, as Jenks suggested that an uncooperative wife of the decedent might hamper the transfer under the option and cause default. Such a trust would also make it more difficult

for decedent to encumber his sister's interest. (R. 82-83.)

Howard A. Will prepared the trusts. (R. 83.)

Hyde did not desire to engage in correspondence on the subject and wanted to handle it orally with his father. He did not wish to create friction between his father and Jenks. His father was never told about Jenks' statement about suit on the notes, but the decedent did know that the Jenks family had obligations to the marriage in connection with the indebtedness on the note. Hyde and Will explained, in general, to Jenks and wife what they contemplated doing. (R. 83.)

On June 23, 1938, Miss Harriette O'Neil came through Chicago on the way to visit farther east. She had lunch with Hyde Gillette, whom she then met for the first time, and left that evening for the east. The decedent had previously told her that his family was pleased with the idea of the proposed marriage to her, but that Jenks and wife were not pleased, that his sister was annoyed, and that he was behind on interest but the pressure came when possible marriage came up. He had said nothing to her about a pre-nuptial agreement. She met Hyde at decedent's suggestion because she wished to meet all his family before the marriage. She spent about an hour and a half with Hyde. He seemed very friendly about the marriage; told her that the Jenks family was not pleased from a financial point of view; mentioned a large debt, and that the Jenks family felt that his father could not take on extra expense, that the upkeep of the Lake Beulah property was a burden, that possibly his father and his wife would not be interested in coming to Lake Beulah regularly; and that perhaps some arrangement could be made for them to come as guests once in a while. She told him she so preferred, rather than to continue the upkeep and joint ownership and use. She was not concerned, because

she thought probably some arrangement could be worked out to satisfy the Jenks family. Ante-nuptial agreement was not mentioned. Hyde told her that he and Mr. Will were working on a plan which they thought might take care of the matter and not jeopardize his father's interest. He mentioned the plan in general terms. It had not at that time been completely formulated. It was not until later, after talks with Jenks and his wife, that Hyde and Will arrived at a definite plan. It was entirely completed before the decedent came east, but no documents had been drawn because Hyde wished to discuss the matter with his father and see what he thought of it. (R. 83-84.)

About August 1, 1938, decedent arrived in Chicago. He and Hyde had lunch together that day. Hyde told him in general terms of Jenks' attitude toward getting some payment on the notes, and then suggested the arrangements that had been decided upon. He did not wish to make his father angry and did not tell his father what Jenks had said about suit on the note. Decedent's reaction to the plan was that if Howard (Will) and Hyde "thought it was all right and it met the problems that had arisen, for us to go ahead and draw the instruments." The matter was discussed practically not at all with the decedent after the instruments were prepared. Hyde gave the instruments to his father to read and explained them in general, not in detail but more in terms of the general principles involved. He told his father that his one purpose was to permit him to continue a happy life and to get married with the friendly feeling of all the family, which could be accomplished by some arrangement definitely to take care of the interest on the note. Decedent left the matter entirely in the hands of Hyde and Howard. Hyde tried to make it perfectly clear to his father what the document meant and covered, but had no special conference

with him. Hyde originated the idea of transferring the Lake Beulah property, and the idea of providing $1,500 per year for the new wife, in order to make the arrangement acceptable to his father. There was no discussion of a will. It was Hyde's purpose to keep the Jenks family and his father apart and they never discussed the matter in Hyde's presence. Hyde knew what he wished to accomplish. He does not remember ever showing the documents to Jenks or his wife. He told Mrs. Jenks in a general way what they contained. Jenks did not suggest any method of getting interest paid on the note. Hyde took it upon himself to find a way. He showed his father and Mrs. Jenks that the Hartford property was gradually improving and he thought that some day the earnings would also improve. Though the trust on the Michigan Avenue property was revocable, Hyde did not then feel that his father would revoke it, thinking his father was not sufficiently interested in business details to take the trouble to make that step. (R. 84-86.)

Howard Will was never asked by the decedent to prepare the transfers. During July and August, 1938, Hyde and he discussed the matter. Will devoted several days to drafting the instruments. One of the senior members of his firm, who collaborated with him, was familiar with federal tax matters. That member of the firm suggested the pre-nuptial agreement. Will discussed the plan with Hyde from as early as June, 1938. (R. 86.)

On September 17, 1938, the decedent signed the trust agreements. Will went over them with decedent, "high spotted the documents, the important provisions" and discussed them "rather thoroughly" with him. Will gave decedent the ante-nuptial agreement, suggesting that he take it with him and discuss it with Miss O'Neil,

and it was arranged for her to come in on Monday the 19th to sign or discuss it. She was at Kenilworth, Illinois, and decedent went there to spend the week-end, the 17th and 18th of September. He did not discuss the ante-nuptial agreement with her but told her that Hyde and Will were writing up some papers to that effect. She came in on Monday, September 19th, to Hyde's office. She, decedent, Hyde and Will were present. She then met Will for the first time. He suggested that she should have a lawyer to look over the papers, but she felt it to be unnecessary. She read the ante-nuptial agreement, which mentioned the trust agreements, and they were explained to her "more or less" before she signed. She realized, when she read the agreement, that the transfers had previously been made. (R. 86-87.)

Decedent and Harriette O'Neil were married October 29, 1938, and lived together until his death. On April 24, 1939, the decedent executed his will, giving, devising, and bequeathing all of his property to his wife. His children were not mentioned in the will. He did not discuss it with his wife and she did not at the time know that he had executed it. (R. 87.)

The lessees of the Michigan Avenue property exercised their option thereon in the spring of 1939 and paid for the property $300,000, one-half of which went to Mrs. Jenks, who requested Hyde to invest it in securities for her. She still owns them. (R. 88.)

On September 3, 1940, the decedent amended the trust of the Michigan Avenue property to provide a minimum income to him of $6,000 a year (if necessary, to be paid from principal) except any payment necessary to Mrs. William S. Jenks. (R. 88.)

In December, 1940, Mrs. Jenks created a trust, drawn largely by Will. Therein she transferred her half interest in the Hartford property to Hyde Gillette in trust to pay the income to her four nieces and nephews,

or their issue, for life, the corpus to go to them on termination. (R. 88.)

Decedent was not seriously ill at any time prior to his last illness, except for colds, and was not attended by a physician until the day he died, when his wife, against his will, called a doctor. He had for two or three weeks complained of not feeling exactly as usual. He stayed in bed two days before his death. His physician, about ten o'clock in the morning, told his wife his kidneys were not functioning correctly, and for him to keep warm and stay in bed. He died about two o'clock that day. The certificate of death gives coronary thrombosis due to kidney infection, as the cause of death. (R. 87-88.)

The decedent's estate tax return was filed on or about March 3, 1945, with the Collector at Chicago, showing a total estate tax payable of $45,064.39, which was paid as follows (R. 88):

9-27-44	$12,158.49
3-10-45	32,905.90

The return did not include as a part of the decedent's gross estate the ownership of any interest in the Hartford Building or the Lake Beulah property. (R. 88.) In his deficiency notice the Commissioner determined that the two properties had been transferred by the decedent in contemplation of death (R. 12) and included the properties in the decedent's gross estate (R. 88-89).

The Tax Court affirmed the Commissioner's conclusion that decedent's transfers of the two properties had been made in contemplation of death within the meaning of Section 811(c) of the Internal Revenue Code. (R. 89-95.)

SUMMARY OF ARGUMENT

Taxpayer had the burden of proving that the decedent's outright transfer of his interest in the Lake Beulah property and his transfer in trust of his interest in the Hartford Building property were not made in

contemplation of death—that is, that the decedent's dominant motive in making the transfers was one associated with life rather than with death. The reason given by taxpayer for the transfers is not substantiated by evidence. Accordingly, taxpayer failed to meet her burden of proof and for that reason alone the decision of the Tax Court should be affirmed. Moreover, there is affirmative evidence indicating that the transfers were motivated by a desire on the decedent's part to prevent his contemplated remarriage from affecting the devolution of these properties to his children and that the transfers were intended as substitutes for testamentary dispositions to his children, with the result that the transfers were made in contemplation of death.

ARGUMENT

Taxpayer Has Not Met Her Burden of Proving That the Decedent's Transfers of the Hartford Building and Lake Beulah Properties Were Not Made in Contemplation of Death

In his deficiency notice the Commissioner determined that the decedent's transfers of the Hartford Building and Lake Beulah properties were made in contemplation of death. (R. 12.) That determination is presumptively correct and the executrix of the decedent's estate (hereinafter referred to as the taxpayer) had the burden of proving it to be wrong. *City Bank Co.* v. *McGowan,* 323 U. S. 594, 599; *Pearce* v. *Commissioner,* 315 U. S. 543; *Welch* v. *Helvering,* 290 U. S. 111, 115. The Tax Court concluded that taxpayer had not met her burden of proof. (R. 89-90, 95.) Thus, the only question before this Court is whether that conclusion of the Tax Court is "clearly erroneous".[1]

[1] This Court has recognized that the Tax Court's finding that a transfer was made in contemplation of death is primarily a finding of fact (*Sullivan's Estate* v. *Commissioner,* 175 F. 2d 657; *Koch* v. *Commissioner,* 146 F. 2d 259), to which Rule 52(a) of the

At the outset it should be noted that, as the Tax Court stated (R. 89), the evidence is "in a peculiar condition." The record certainly justifies the Tax Court's statement (R. 89-90) that—

> Though the crux of the matter is as to what the decedent contemplated, the record is almost, if not quite, barren as to what he actually had in mind. A great deal of evidence appears as to what his son and son-in-law intended in drawing the instruments which the decedent signed; also to show the intention of Jenks and to a lesser degree of his wife. But remarkably little gives any real view of the state of mind of the decedent, as to what he did or did not contemplate, in making the transfers involved. * * *

Taxpayer nevertheless contends that the record contains clear and uncontradicted evidence that the decedent's transfers were not made in contemplation of death. (Br. 22.)

Contrary to taxpayer's contention (Br. 37-40), it is of no importance here that the evidence of the decedent's activities, health and mental attitude shows that he had no thought of *imminent* death in mind when he made the transfers of the Hartford Building and Lake Beulah property. A transfer "in contemplation of death" within the meaning of Section 811(c) of the Code, *supra,* need not be one made in contemplation of imminent death; since the object of the statute is to reach substitutes for testamentary dispositions and thus prevent evasion of the estate tax, a transfer is made in contemplation of death if the decedent contemplated death in the sense that his dominant motive in making

---

Federal Rules of Civil Procedure is now applicable (*Sullivan's Estate* v. *Commissioner, supra.*). Under Rule 52(a) the Court may reverse a finding of the Tax Court only if the finding is "clearly erroneous". *Kohl* v. *Commissioner,* 170 F. 2d 531 (C.A. 8th), certiorari denied, 337 U. S. 956.

the transfer was of the sort which leads to a testamentary disposition. *United States* v. *Wells,* 283 U. S. 102; *City Bank Co.* v. *McGowan,* 323 U. S. 594; *Allen* v. *Trust Co. of Georgia,* 326 U. S. 630; see also Treasury Regulations 105, Section 81.16 *supra.* As the Supreme Court stated in *Allen* v. *Trust Co. of Georgia, supra,* p. 635:

> Since the purpose of the contemplation of death provision was to reach substitutes for testamentary dispositions in order to prevent evasions of the tax (*United States* v. *Wells, supra,* pp. 116-117), *the statute is satisfied,* it is said, *where for any reason the decedent becomes concerned about what will happen to his property at his death and as a result takes action to control or in some manner affect its devolution.*
>
> That is a correct statement of the governing principle for it presumes the existence of the requisite motive. * * * (Italics supplied.)

Taxpayer's burden was to prove not only that the decedent, in making the transfers here involved, was motivated by "purposes associated with life, rather than with the distribution of property in anticipation of death" but that such a purpose was the decedent's dominant, controlling or impelling motive. *Allen* v. *Trust Co. of Georgia, supra,* pp. 635-636.

Taxpayer asserts that the decedent's transfers were occasioned by an affirmative living motive of removing an important obstacle to his remarriage. (Br. 22-29.) We do not understand taxpayer to contend that the decedent's contemplated remarriage of itself is sufficient as a living motive for making the transfers. Such a contention would in any event have no merit. As the Court of Appeals for the Sixth Circuit stated in *In re Kroger's Estate,* 145 F. 2d 901, 906:

> No strength inheres in the argument that the decedent's mere contemplation of marriage estab-

lishes for the transfers a life motive associated with marriage rather than a motive to prevent his proposed marriage from interfering with the devolution of the bulk of his property to his children and grandchildren at his death.

The so-called "obstacle" to the decedent's remarriage which taxpayer contends the decedent was motivated in removing relates to the objections of the decedent's sister, Mrs. Jenks, and her husband.[2] Taxpayer does not clearly explain just what objection of the Jenks she contends the decedent was motivated in removing. However, as taxpayer states (Br. 24), the decedent was indebted to Mrs. Jenks on a note in the amount of $41,650 on which he had paid no interest since 1936. Mr. Will, the decedent's son-in-law who drew the transfer instruments, testified that as to the Hartford Building property the Jenks' "primary interest was to get the note secured" (R. 174), and the Tax Court so found (R. 81).[3] It therefore appears to be taxpayer's contention that the decedent, in making the transfer of his interest in the Hartford Building property, was motivated by a desire to provide for security on or payment of his indebtedness to Mrs. Jenks. (Br. 24-25.) In any event, that is the only contention which taxpayer could possibly make on this record. With respect to the Lake Beulah property, it appears that taxpayer's contention is that the decedent transferred his interest therein in order to mollify the Jenks' irritation at his failure to pay half of the ex-

---

[2] As the Tax Court found (R. 80) and taxpayer states (Br. 23), the decedent's children were pleased with the prospect of his remarriage.

[3] Mr. Jenks was evidently concerned with other financial angles respecting the Michigan Avenue property (see R. 81), but the decedent's transfer of his interest in that property is not directly involved here. The transfer was by a revocable trust and the property was for that reason includible in his gross estate regardless of his motive for making the transfer.

penses connected with the property and because of the Jenks' "undercurrent of feeling" that a new wife might not fit congenially into the family circle at Lake Beulah. (Br. 33.)

The decedent's transfers of his interest in the Hartford Building and Lake Beulah property were two of the three transfers he made on September 17, 1938, approximately six weeks before his remarriage. The Lake Beulah property he conveyed outright to his children. (R. 73.) His interest in the Hartford Building he irrevocably conveyed to his children in trust subject to the payment of the principal, accrued interest, and future interest on his note to Mrs. Jenks. (R. 20-32.) As to his interest in the Michigan Avenue property, he created a trust (R. 33-48) which, because it was revocable, was included in his gross estate and did not give rise to any part of the estate tax deficiency involved here. Under this latter trust the net income was payable to the decedent for his life except that, if the Hartford Building trust did not pay $1,000 a year as interest to Mrs. Jenks, that part of $1,000 which the Hartford trust did not pay to Mrs. Jenks was to be paid from the net income of the Michigan Avenue property trust. After the decedent's death, the net income was payable to the decedent's children, except that (1) Mrs. Jenks, if she survived the decedent, was to be paid such portion of the income as might be necessary to assure her an income of $1,000 a year from the Hartford Building trust and this trust, and (2) the decedent's prospective wife, if she survived him, was to receive $1,500 a year for her life. The trust was terminable after the death of Mrs. Jenks and the decedent's wife and upon termination the corpus was payable to the decedent's children or their appointees, etc.

The effect of the transfers is evident. By making the transfers, the decedent provided security for his note

indebtedness to Mrs. Jenks and for payment of interest on the indebtedness; retained substantially the same amount of income he had been receiving;[4] made provision for an annual payment to his prospective wife beginning at his death; and, by the conveyances to his children, prevented his prospective wife from having dower or other statutory rights in the property at his death. The logical conclusion is that in making the transfers the decedent was motivated by the thought of death in the sense that he intended to prevent his proposed marriage from interfering with the devolution of these properties to his children at his death. As will been seen later, there is some affirmative evidence to support such a conclusion and, thus, that the transfers were made in contemplation of death within the meaning of Section 811(c) of the Code.

It should first be noted that the fact that the Hartford trust provided security for Mrs. Jenks' note and for payment of interest on the note does not explain the transfer of decedent's interest in the property to his children. The note was for not more than $45,000 including interest, whereas the decedent estimated that his interest in the building was worth about $175,000, and taxpayer has not contested the Commissioner's figure of $120,-621.32. (R. 79.) Accordingly, as the Tax Court stated (R. 91-92):

> It is, of course, at once obvious that a conveyance of the property by way of security, by mortgage or deed of trust, conditioned upon payment of the indebtedness on the decedent's note without the further transfer of the corpus to the children as

[4] At that time the Michigan Avenue property constituted the sole source of decedent's income (R. 162), although the Hartford Building property was improving (R. 163-164). Under a lease on the Michigan Avenue property the decedent received $6,000 a year. (R. 77.) This he retained under his transfer in trust of the property, since the income was payable to him for life subject to possible payment of $1,000 a year to Mrs. Jenks.

> beneficiaries, would have given Mrs. Jenks just the same protection as she received from the conveyance of the Hartford Building; * * * Why then did the decedent make the further and financially unnecessary conveyances to the children? The element of lack of financial necessity therefor destroys, in our view, the argument that the dominant motive in the transfers was the satisfaction of Jenks and wife. It simply is not reasonable to say that it was necessary to transfer to the children, as well as secure Mrs. Jenks. Nothing in the record indicates that she, or her husband for her, required conveyances of the breadth actually made. On the contrary, Will, when asked "was it Mr. and Mrs. Jenks' thought at all, did they insist that the provisions go in, the two trusts relative to the distribution of corpus to the children at termination of such trust?" answered "No, they did not," and later said that their primary interest in the Hartford trust was to get the note secured. He, the attorney in the matter, did not recall that he "ever explained to them the complete distribution of the corpus of those trusts." * * *

Similarly, there is nothing in the record to show that the decedent transferred his interest in the Lake Beulah property to his children because of the Jenks' objections. The record amply reflects that the decedent was aware that the Jenks objected to his remarriage because of his indebtedness to Mrs. Jenks (R. 129-130, 132, 158, 159), but the outright transfer of his interest in the Lake Beulah property to his children in no way relieved that indebtedness. Moreover, there is no evidence to show that the decedent was ever informed of any objection the Jenks might have had with respect to the Lake Beulah property or that the Jenks had any objection to his remarriage other than his indebtedness to Mrs. Jenks. In making the transfers the decedent could not of course have been motivated by an objection of the Jenks of which he was unaware. In addition, it ap-

pears that the Jenks actually had no serious objection to the decedent's remarriage so far as the Lake Beulah property was concerned. Mrs. Jenks testified that she had no feeling about a new wife occupying the summer home at the lake (R. 114) and, while Mr. Jenks apparently thought the decedent should be relieved of the burden of his share of the upkeep which he had not always paid anyway, Mr. Will testified that Mr. Jenks' feeling about the Lake Beulah property was not as strong as on the business properties (R. 171).

Thus, in contending that the decedent's transfers to his children of his interest in the Hartford Building and Lake Beulah properties were motivated by a desire to remove an obstacle to his remarriage, taxpayer is in effect contending that the decedent was motivated by a desire to remove an obstacle which did not exist. Such a contention is of itself anomalous. It is even more anomalous that taxpayer should insist by implication that, when the decedent was contemplating remarriage at his late age (75 years) to a much younger person and when he would naturally be concerned about his financial resources and the devolution of his property at his death, he gave no thought to the fact that he was unnecessarily making transfers of property to his children. Taxpayer's contention respecting the decedent's motive really amounts to an assertion that the decedent let his son Hyde and Mr. Will, his son-in-law, deprive him of the bulk of his property without his knowing about it or caring.

Taxpayer's own evidence makes it reasonably apparent that the decedent, though not one to be concerned with business matters, did in fact know what he was doing. Both the decedent and his prospective wife were told that the Jenks' objections to the decedent's remarriage were based upon the decedent's indebtedness to Mrs. Jenks (R. 129-130, 132, 158, 159) and to his pros-

pective wife the decedent indicated "that the reason Mr. and Mrs. Jenks had some objections to the marriage was that he owed them quite a large sum of money, a debt contracted, * * * (R. 129-130). The contents of the transfer instruments were explained to the decedent by both his son Hyde and Mr. Will, his son-in-law who drew the instruments. Hyde's testimony was that (R. 159-160):

> I do not recall having any special or extended conference going over the documents with him except that I did try to make and felt duty bound to make it perfectly clear to him exactly what they meant and what they covered. * * *

Mr. Will testified as follows (R. 169-170):

> I had discussed the trust instruments with the deceased in a general way prior to September 17 when he came to my office to sign them. On that day I went over the instruments with him, high-spotted the important provisions, and we discussed them rather thoroughly at that time. * * *

Mr. Will also conceded that "it must have been pointed out to Mr. Gillette that the corpus of the Michigan Avenue trust would eventually go to his four children" (R. 173) and that the decedent "realized that the Michigan Avenue trust was revocable" (R. 176).[5] Even a very general explanation of the trusts and of the warranty deed transferring the decedent's interest in the Lake Beulah property would have been sufficient to inform the decedent that he was making transfers of his interest in the properties to his children. Since he thought that his indebtedness to Mrs. Jenks was the only reason for the Jenks' objection to his remarriage and estimated that his interest in the Hartford building property was

[5] The decedent did in fact amend the trust on March 8, 1939 (R. 49-53), approximately six months after he made the transfers, and also revoked the trust in part on September 3, 1940 (R. 55-58).

worth $175,000 as against his indebtedness of approximately $45,000 to Mrs. Jenks, he could not have helped knowing that the transfers to his children of his interest in the Hartford Building and Lake Beulah properties were unnecessary to remove the Jenks' objections to his remarriage. It is therefore futile for taxpayer to contend in effect that the decedent blindly signed the transfers in order to eliminate the Jenks' objection to his remarriage.

As previously stated, there is also affirmative evidence that the decedent's transfers were made in contemplation of death. The Michigan Avenue trust provided that, after the decedent's death, $1,500 a year of the trust income should be paid to decedent's wife or widow for life. As to this, Hyde Gillette testified (R. 160):

> I originated the idea that the trust of the Michigan Avenue property should pay the amount of $1,500 to Mrs. Gillette if she married my father and should survive him. In thinking of the matter during the summer I realized that I would have to make the arrangements I was trying to make acceptable to him, and I knew that he couldn't feel happy in his marriage if he had not made some provision for his contemplated wife and that was the reason that I suggested the figure to him and suggested that arrangement.

If the provision for payment of $1,500 a year at decedent's death to the decedent's then prospective wife was necessary to make the transfers acceptable to the decedent, as Hyde in effect testified, the decedent must have been thinking of the consequences of his death so far as his property was concerned. Indeed, other evidence reflects that he did have such thoughts. The plan for the transfers included the execution of an antenuptial agreement (R. 61-68), which recited that the decedent had conveyed his undivided interests in the Hartford Building, Michigan Avenue and Lake Beulah

properties; that he intended to provide for the payment out of the income of the Michigan Avenue property the sum of $1,500 a year to his wife for life commencing with the decedent's death; and that, in consideration of the provision for payment of that sum out of the income of the Michigan Avenue property, his prospective wife waived her dower and other statutory rights which might become vested in her in the Hartford Building, Michigan Avenue and Lake Beulah properties.

The plain inference to be drawn from the provisions of this agreement cannot be disregarded on the ground that the decedent had no knowledge of the provisions or did not intend what they imply. At the time the decedent signed the transfers on Saturday, September 17, 1938, the agreement was given to him to discuss with his prospective wife and it was arranged then that she should come in the following Monday to sign it. (R. 86.) Accordingly, it was apparently already known that she had no objection to the agreement. Over the week-end the decedent mentioned and showed the agreement to her but did not discuss it. (R. 131.) She signed it the following Monday (R. 87), as planned. On April 24, 1939, about seven months later and six months after his marriage, the decedent executed a will in which he bequeathed all his property to his wife and did not mention his children. (R. 87.)

The decedent was then 75 years of age and contemplated marriage with a much younger person. He had great love for his children. (R. 133, 173.) He obviously knew that the effect of the transfers and antenuptial agreement was to bar his prospective wife's dower or other rights in the properties which had been the subject of the transfers, that he was conveying his interests in the properties to his children, and that he had provided for his prospective wife's welfare after his death to the extent that in the Michigan Avenue trust

he had provided for payment of $1,500 a year to her after his death. It is a natural conclusion that he intended to prevent his marriage from affecting the devolution of these properties to his children and intended the transfers as substitutes for testamentary dispositions to his children, with the result that the transfers of his interests in the Hartford Building and Lake Beulah properties were made in contemplation of death.[6] Cf. *In re Kroger's Estate, supra.*

Affirmance of the Tax Court's decision does not of course require acceptance of that conclusion. It is sufficient that the evidence does not show that the decedent's dominant motive in making the transfers was a life motive. Quite plainly, we submit, the Tax Court was correct in concluding that taxpayer had not met her burden of proof.

---

[6] The record is remarkably silent as to any expression on the part of the decedent with respect to disposition of any of his property to his children at his death. It seems a natural conclusion that, at his age and with the great love he had for his children, it was assumed and understood by the decedent, the children and the Jenks that the children were to receive the bulk of his property at his death and, thus, that no expression on the decedent's part was necessary. In this connection, as well as in connection with taxpayer's contention as to decedent's motive in making the transfers, it is interesting to note that Mrs. Jenks conveyed her own half interest in the Hartford Building property to the decedent's children, her nieces and nephews, in December, 1940 (R. 175), while her husband was still alive (R. 165) and just a little over two years after, according to taxpayer's argument, decedent made the transfers of his interest in the Hartford Building property in order to provide security or payment of his indebtedness to Mrs. Jenks.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
MELVA M. GRANEY,
Special Assistants to the Attorney General.

FEBRUARY, 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 873828 490